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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1386

DONALD J. MILLER,

Petitioner,

against

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON and CURTIS, and LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENT ATTORNEY GENERAL

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Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT ATTORNEY GENERAL

Question Presented

Was a three-judge District Court required to hear petitioner's claim that Chapter 1071 of the New York Laws of 1969, requiring the fingerprinting of all employees of firms affiliated with national securities exchanges, violates his right of privacy as protected by the Fourth and Fourteenth Amendments to the Constitution and also violates his right to equal protection of the laws?

Statement

Petitioner instituted this suit in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief against the enforcement of the then newly-enacted Chapter 1071 of the New York Laws of 1969 (General Business Law, § 359-e). He sought a three-judge district court to determine the constitutionality of the statute, which requires the fingerprinting of employees of firms which are members of national securities exchanges.*

A. The Pleadings

Relying for jurisdiction on the Civil Rights Act (42 U.S.C. § 1983), the complaint set forth four causes of action. It contended first, that the statute works on invasion of privacy under the Ninth and Fourteenth Amendments to the United States Constitution, second, that it "is an illegal search and seizure" under the Fourth and Fourteenth Amendments to the Constitution, third, that "it is a punishment without due process of law" and, fourth, that "it creates an invidious and irrational discrimination against employees of firms affiliated with a National Security Exchange, and thereby denies the plaintiff the equal protection of the laws under the Fourteenth Amendment to the Constitution."

In support of these causes of action, petitioner alleged that he was an attorney employed by the firm of Paine, Webber, Jackson and Curtis "as a specialist in surveillance of firm activities to insure compliance with firm policies and applicable laws and regulations", and asserted that he did "not work directly handling money or securities."

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* Petitioner's case was heard and decided with a companion case, *Thom, et ano.* v. *New York Stock Exchange, et al.*, 69 Civ. 4092 (S.D.N.Y.), which was not appealed.

The complaint was brought on by order to show cause and a temporary restraining order was signed restraining "the defendants, under FRCP Rule 65, during the pendency of this litigation, from fingerprinting the plaintiff and/or from dismissing the plaintiff from employment for failure or refusal to be fingerprinted, . . ."

Respondents moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim on which relief could be granted. F. R. Civ. Proc. 12(b)(1), (6).

B. The District Court Opinion

In an extensive and carefully reasoned opinion, the Hon. Edward Weinfeld denied petitioner's motion to convene a three-judge court, granted respondents' motion to dismiss the complaint and vacated the temporary restraining order. In doing so, Judge Weinfeld recognized that he was concerned only with "[t]he single narrow issue" of whether the complaint contained "the necessary constitutional substance" to require the convening of a three-judge court. He concluded that it did not (30-31).*

Judge Weinfeld first considered the evils "that have bedeviled an industry and concerned the state—the year by year increase in stolen or lost securities" (31). He pointed out that the volume of transactions on the New York Stock Exchange alone rose 75% between 1963 and 1968 and that in the single year between 1967 and 1968 volume rose from an average of 10 million to an average of 13 million shares a day, an increase of 30% (31). He added that the number of employees was also growing. It was close to 50,000 in 1969 with 6,000 having been added in 1968 and, that year, there were about 10,000 applicants for positions in the industry (31).

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*Numbers in parentheses refer to the pages in the petition for certiorari which contain the District and Circuit Court opinions.

It was found that, during this time of increasing volume and personnel, the number of stolen or lost securities was "staggering", soaring from a total value of $9 million in 1966 to $37 million both in 1967 and in 1968 (31-32). Moreover, "[t]he depredations involved not only persons who had immediate access to the securities, but others who illicitly received and disposed of them" (32).

The court stated that previous procedures for learning about the background of employees "had not proved altogether effective" (32) even though both the SEC and the New York Stock Exchange had rules requiring extensive information to be provided by the employee plus a photograph and signature exemplar. 17 C.F.R. § 240.17a-3(a)(12) (1969); N.Y.S.E. Rule 345.19. The Court found that:

> "Despite these regulations, theft of securities occurred involving employees with criminal records undisclosed at the time of their employment." (32)

Chapter 1071 was, thus, found to be designed to deal with "a specific and worsening problem" (34).

In turning to the claims raised against the statute, Judge Weinfeld started from the premise, which was undisputed, that "the securities industry is a business affected with a public interest and that the state has a legitimate concern with the problem of ever-mounting thefts in the industry . . ." (34). He termed the power of the state to combat crime in the industry by establishing a means of identifying employees with criminal backgrounds "not open to challenge" and found fingerprinting a way "to verify at slight inconvenience . . . the information submitted . . ." (34).

Judge Weinfeld then meticulously analyzed and rejected each of petitioner's attacks on the statute, first distinguishing the case on which petitioner principally relied, *Davis* v. *Mississippi*, 394 U. S. 721. He pointed out that that

case concerned the methods by which evidence was obtained of criminal activity, specifically the dragnet arrest and detention of persons for fingerprinting in connection with a particuar investigation. He found that case to be "but another application of the principle that the Fourth Amendment applies to all searches and seizures of the person no matter what the scope or duration" (36). The Court also found the right of marital privacy at issue in *Griswold* v. *Connecticut*, 381 U. S. 479 "in no sense analogous" (36) to petitioner's claim.

Citing an extensive array of authority, the Court rejected the contention that fingerprinting is an affront to dignity giving numerous examples of its use in non-criminal connections (36-39) and concluding that "the public has long recognized it as a valuable and reliable means of identification, and to suggest that a stigma attaches when it is so used is to fly in the face of reality" (39).

Judge Weinfeld also held the claim that fingerprinting is an "unwarranted invasion of . . . personal liberty or privacy is equaly unjustified" (39). He pointed out that it was used only to verify information required to be given, a requirement itself not challenged, and that it was no more an invasion of a privacy than the photograph or signature also required (39).

The claim that the statute is overbroad because it does not distinguish among the various positions in the industry was rejected:

> "Even employees in the securities business who have no direct access to securities may be in contact with fellow employees having direct or immediate access to or knowledge of the location of negotiable securities running into astronomical figures. Theft of securities may be accomplished not only be those who handle certificate in the 'back room' but by other employees who are in a position to conceive, aid and abet

> the crime or to 'finger' the securities or to arrange for outsiders to receive and sell the stolen certificates." (40)

Judge Weinfeld said that it was for the Legislature to weigh petitioner's proposal that the securities industry be automated in lieu of fingerprinting (41-42).

He also found that since the petitioner had failed "to establish any significant invasion of a protected privacy interest" a stringent test "ordinarily reserved for the 'preferred' First Amendment rights" was not required and that "the means adopted are reasonably related to the purpose sought to be achieved . . ." (42).

The Court found no substance to the claim that the absence of a provision for return of the fingerprints made the statute unconstitutional, pointing out that there is no limitation on the use of fingerprints properly obtained and no prejudicial classification attaches to the fingerprints which are obtained (43-44). The Court regarded as frivolous and conjectural the claim that the statute was meant to create an atmosphere of general surveillance (42-43).

Finally, Judge Weinfeld held the claim that the statute worked a denial of the equal protection of the laws to be "patently frivolous" (45). He pointed out that the fact that other industries to which the Legislature has not applied the act may present similar problems did not render the act unconstitutional and its extension "if evils also exist in related industries" was a matter of legislative judgment (45).

C. The Opinion of the Court of Appeals

After the complaint was dismissed and the temporary restraining order dissolved, respondent was discharged

by the respondent Paine, Webber, Jackson and Curtis, at least in part for instituting the instant action. The Court of Appeals affirmed the Circuit Court on Judge Weinfeld's "thorough and well-reasoned opinion" (25) adding that it was not necessary for him to have convened a three-judge court to reach his decision (25). The Court also stated that its decision was not to be read to foreclose a claim by petitioner that his discharge for instituting that action was unlawful although no inference was to be drawn "that such a claim would be legally sustainable" (26).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The Courts below correctly held that the claim that Chapter 1071 of New York Laws of 1969 establishes an unreasonable invasion of privacy and a denial of the equal protection of the laws is so insubstantial as not to require the convening of a three-judge court. Accordingly, the petition presents no issue requiring review by this Court.

1. Chapter 1071 is reasonably calculated to meet a specific problem in an industry affected with a public interest.

The New York statute requiring the fingerprinting of employees of the securities industries is the direct result of a steadily worsening problem of crime in the industry aggravated by increased volume of business and increased personnel (*supra,* pp. 3-4). Petitioner did not dispute below, and does not dispute here, the power of the State to pass legislation with respect to a business affected with the public interest. He does not deny that the securities industry is such a business or dispute the underlying facts found by the District Court. Finally, he does not dispute either the right of an employer to know of any prior criminal background or the relevance of such information

to attempts to cope with the problems engendered by the mounting volume, mounting and shifting personnel and mounting crime. See e.g., *DeVeau* v. *Braisted*, 5 N. Y. 2d 236 (1959), aff'd 363 U. S. 144, *reh. den.* 364 U. S. 856; *Matter of Barsky* v. *Board of Regents*, 305 N. Y. 89 (1953), *aff'd* 347 U. S. 442; *Staten Island Loaders Inc.* v. *Waterfront Commission*, 117 F. Supp. 308 (S.D.N.Y. 1953), *aff'd* 347 U. S. 439 (1954); *Linehan* v. *Waterfront Commission*, 116 F. Supp. 683 (S.D.N.Y. 1953), *aff'd* 347 U. S. 439; *Kemp* v. *Hults*, 17 N. Y. 2d 191 (1966), *app. dism.* 385 U. S. 17.

Thus, petitioner's complaint comes down to the fact that, although he recognizes both the right of the State to protect the securities industry and also the relevance of prior criminal backgrounds to such protection, he quibbles with the legislative determination that fingerprinting is a proper and necessary course to implement that power and to cope with that problem. However, as the District Court properly found, the legislative determination is presumed valid and is not to be upset unless there is a total lack of rational connection between the statute and the problem to be solved. *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 594-595; *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938).

The securities industry is closely regulated, controlling as it does the fortunes not only of the very rich but of the ever-increasing numbers of small investors. The Legislature, in an attempt to meet the challenge of organized crime and the depredations of other criminals drawn to the honeycomb of readily accessible negotiable securities, has sought to provide insulation from these assaults within the industry itself by the double-check on personnel information afforded by fingerprints. It is frivolous to challenge the new law in view of the public interest in the

industry and its problems and the close relationship of the statute to those problems. *Ferguson* v. *Skrupa,* 372 U. S. 726.

Fingerprinting is the simplest, least intrusive and most accurate means of verifying the information required to be provided. As a scientific method, it is virtually foolproof and as a physical inconvenience, it is minimal. *Stevenson* v. *United States,* 380 F. 2d 590 (D. C. Cir.), *cert. denied* 389 U. S. 962; *United States* v. *Kelly,* 55 F. 2d 67 (2d Cir. 1932); *State* v. *Kuhl,* 175 P. 190, 3 A.L.R. 1694 (Nev. 1918).

The efficacy of fingerprinting has made it a widely used technique in a variety of non-criminal situations. See *Friedman* v. *Valentine,* 177 Misc. 437, 30 N.Y.S. 2d 891 (Sup. Ct. N. Y. Co. 1941), *aff'd* 266 App. Div. 561, 42 N.Y.S. 2d 593 (1st Dept. 1943) and *Simone* v. *Kennedy,* 26 Misc. 2d 748, 212 N.Y.S. 2d 838 (Special Term N. Y. Co. 1961), upholding fingerprinting of cabaret employees. The Supreme Court of Nevada has upheld the fingerprinting of persons involved in selling alcoholic beverages. *Norman* v. *Las Vegas,* 64 Nev. 38, 177 P. 2d 442 (1947). Indeed, it "has become customary and considered appropriate in private industry as well as in public service and institutions, to take photographs and fingerprints of individuals, who are connected therewith or detained therein, for their identification for many other purposes or respects than any criminal matters." *Bridges* v. *State,* 247 Wis. 350, 19 N. W. 2d 529 (1945).

In New York and, indeed, in most states there is a wide-ranging spectrum of enterprises, private and public, which have found fingerprinting to be a useful means of identifying persons with criminal backgrounds where such information is relevant. See *Friedman* v. *Valentine, supra,* 30 N.Y.S. 2d at 896; *State ex rel. Mavity* v. *Tyndall,* 66 N. E. 2d 755 (Ind. 1946), *approved* 74 N. E. 2d 914, *app. dism. for want of a substantial question* 333 U. S. 84. The prob-

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lems in the securities industry are at least as serious as those in the industries in which fingerprinting has already been used and in which it has been upheld. A number of state statutes provide for fingerprinting for at least some employees of the securities industry. See Rules of Florida Securities Commission, Chapter 330-3.09; Uniform Securities Act, Idaho Code, 1967, Special Supplement, Title 30, Chapter 14 as amended, § 30-1407; Kansas Administrative Regulations, Article 3, § 81-3-1(c); Nevada Revised Statutes, § 90.130; New Jersey Regulations, Part III, Rule 2; South Dakota Regulations Promulgated by the Commissioner of Securities Part IV-C; District of Columbia Code, 1965, Title 2, Chapter 24, Regulations, Rule 5a-3.

Petitioner's contention that the statute is overbroad in that it requires too many people to be fingerprinted for too little reason rests on the claim that he did not personally handle money and securities and that the industry had previously other more intensive investigation techniques for bonded employees. In addition, he contends that other methods, including, apparently, complete automation of the securities industry, are available. The short answer is that the prior investigative scope obviously was inadequate.

Clearly, if the criminal problem is mounting in the industry, limiting investigation only to persons directly handling monies and securities is not sufficiently effective. On the other hand, a full scale investigation of every employee would be administratively, economically and physically impossible, and even if it could be undertaken, would represent a much greater intrusion on privacy than the simple fingerprinting technique enacted by the Legislature. The hearing procedure proposed in this Court (Pet. p. 15) would similarly be broader than the fingerprinting, or, at the least would be a more time-consuming and less sure way to elicit the same information.

The argument that this particular statute is overbroad is, indeed, somewhat inconsistent with petitioner's position

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since, as we have said, he does not dispute the right of an employer to ask him whether or not he has a prior criminal record or to have his photograph or a sample of his signature. The suggestion that the securities industry can be completely automated hardly solves the problems of today even if one day this suggestion should become a reality.

Finally, the suggestion that the statute does not serve a valid purpose because some people charged with securities crimes do not have criminal records does not prove the point. It does not obviate the likelihood that other people will have been so involved and does not disprove the statement by Governor Rockefeller in approving this bill that:

> "[S]everal securities thefts from member organizations of registered national security exchanges have been perpetrated with the aid of new back office or clerical employees with previously undisclosed criminal records." 2 McKinney's 1964 Laws of N. Y. 2575, 2576.

2. Chapter 1071 does not violate the right of privacy or any other constitutional right of petitioner.

Petitioner's attempt to attribute constitutional significance to his distaste for the fingerprinting requirement borders on frivolity and the authority on which he relies is clearly inapposite. Thus, he relies on *Davis* v. *Mississippi*, 394 U. S. 721, involving a dragnet procedure to secure fingerprints as evidence of crime, in an attempt to sustain a claim that he is the victim of an illegal search and seizure. That case is so irrelevant to a consideration of the statute as to demonstrate the wholly untenable character of plaintiff's challenge. It represents simply another example of the enforcement of the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), as a deterrent to unreasonable police behavior. See also *Bynum* v. *United States*, 262 U. S. 465 (D. C. Cir. 1958). Cf. *Smith* v. *United States*, 324 F. 2d 879 (D. C. Cir. 1963). It was not the obtaining of finger-

prints as such which prompted the *Davis* decision, but rather the police procedures employed to obtain what could have been any kind of evidence.

Thus, neither *Davis* nor any other decision lends substance to the complaint. The administrative search warrant cases, *Camara* v. *Municipal Court,* 387 U. S. 530 and *James* v. *Goldberg,* 303 F. Supp. 935 (S.D.N.Y. 1969), *prob. jur. noted* —— U. S. ——, 38 U.S.L. Week 3319 (Feb. 24, 1970), deal with the necessity of obtaining search warrants to make entries into the home in certain circumstances. They do not proscribe entries with warrants and petitioner only in this Court suggests that a warrant procedure is what he is seeking. However, such a result is absurd here.

The standard enunciated by this Court for the assessment of physical intrusions for blood test purposes is applicable here:

> "The Fourth Amendment's proper function is to restrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Schmerber* v. *California,* 384 U. S. 767, 768.

As we stated, the circumstances are entirely justified and there is no complaint against the manner in which the fingerprints are to be taken.

Similarly, petitioner's assertion that some right of privacy of his is invaded by the fingerprinting technique is untenable. He does not really state why fingerprinting is an invasion of privacy relying instead on *Griswold* v. *Connecticut,* 381 U. S. 479, which is not authority to impair the fingerprinting requirement and on an assertion that the numbers involved render it an invasion of privacy. Yet of the 100,000 people thus far fingerprinted few have protested the practice and it has gone swiftly and smoothly as it does for civil service and federal government em-

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ployees. An invasion of privacy implies that some information is being obtained which is not relevant to legitimate purposes, or that information is being published beyond relevant purposes, or that some physical instrusion into an area or person is being unreasonably made. None of these possible objections is sustainable in this case.

First, as we stated, petitioner does not contend that prior criminal backgrounds are irrelevant or that he has a right to withhold information concerning such background. Thus, since fingerprinting merely verifies information which is required to be supplied in any event, it is not the obtaining of information which may not be obtained. Moreover, there is to be no publication of the records such as there would be in exhibiting a photograph in a rogues' gallery. See *State ex rel. Mavity* v. *Tyndall, supra; Hansson* v. *Harris,* 252 S. W. 2d 600 (Court of Civil Appeals, Texas 1952); *Sterling* v. *City of Oakland,* 24 Cal. Reptr. 696 (D. C. App. 1962). Indeed, unlike photographs, fingerprints are meaningless unless deciphered by an expert. *Sterling* v. *City of Oakland, supra.* Thus, there is no invasion of privacy simply by virtue of the taking of fingerprints. Moreover, there is no physical invasion of privacy such as to render the process itself unreasonable. *United States* v. *Kelly,* 55 F. 2d 67 (2d Cir. 1932); *Bridges* v. *State, supra; Sterling* v. *City of Oakland, supra.* The taking of fingerprints does not represent a stigma, an indignity or a punishment. *United States* v. *Krapf,* 285 F. 2d 647 (3rd Cir. 1960); *Sterling* v. *City of Oakland, supra; Bridges* v. *State, supra.*

Petitioner's suggestion that the purpose of the statute is broader than to identify persons with prior criminal backgrounds is unsupported, even in the absence of the requirement that the fingerprints be returned. There is no constitutional requirement for such a procedure and no government agency does return them. *Stevenson* v. *United States,* 380 F. 2d 590 (D. C. Cir.) *cert. denied* 389

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U. S. 962; *Sterling* v. *City of Oakland, supra.* Moreover, the fact that the prints were taken will not in the future be a source of humiliation or stigma since unlike fingerprinting for criminal charges, there is no stigma attached to having been fingerprinted for employment purposes. Accordingly, the safeguards accorded in New York to persons acquitted of crimes, even if they were constitutionally required, which they are not (*Stevenson* v. *United States, supra; Sterling* v. *City of Oakland, supra*), are not required here.

3. The statute is not a denial of equal protection of the laws.

Petitioner also claims that he has been denied equal protection of the laws claiming that theft and embezzlement are problems in many industries which do not require fingerprinting. In fact, as we have stated in Point I, *supra,* many industries do require fingerprinting or it is required of them by law. Moreover, the fact that the State has chosen to operate on an industry by industry basis as investigation discloses the need for a fingerprinting procedure does not make the State action irrational or invidious but, rather, supports the validity of its action. *West Coast Motel Co.* v. *Parrish,* 300 U. S. 370, 400.

Finally, of course, the securities industry is closely regulated both under federal and state statutes—a fact which distinguishes this industry from the general run of business. In such industries employees may be required to meet additional scrutiny if they elect to seek such employment. See e.g., *Linehan* v. *Waterfront Commission of N. Y. Harbor,* 116 F. Supp. 439 (D.C.N.Y. 1953), *aff'd* 347 U. S. 439, *reh. den.* 347 U. S. 994. The host of state statutes containing fingerprint requirements in regulated industries or occupations is set out in the appendix to Judge Weinfeld's opinion. Whether fingerprinting should be a required procedure for employment in other regulated

industries, which may have similar problems is, as Judge Weinfeld stated "a matter of legislative judgment", not rising to the dignity of a constitutional objection.

In view of the obvious insubstantiality of the issue presented, there was no need to convene a three-judge court. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 115; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715; *California Water Service Co.* v. *City of Redding*, 304 U. S. 252, 255; *Ex Parte Poresky*, 290 U. S. 30; *Green* v. *Board of Elections*, 380 F. 2d 445 (2d Cir. 1967), *cert. denied* 389 U. S. 1048. Petitioner's suggestion that there are issues of fact to be resolved reflects no more than a restatement of his legal theory which in turn is based on speculation with no foundation in fact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, April 28, 1970.

Respectfully submitted,

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